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Legal Procedure: Access to Justice: 1883 to 1983

Justice Gibson

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Articles

The Honourable
Mr. Justice Gibson

Legal Procedure: Access to
Justice: 1883 to 1983

I. Introduction

The invitation to me, as present Chairman of the Law Commission for England and Wales, to take part in this centenary celebration of Dalhousie Law School was both an honour conferred on our Law Commission and a recognition of our shared heritage of the common law and of the spirit and endeavour of law reform shared by the legal systems of Canada and of the United Kingdom. Greater honour was done to my office and to me by the conferring of the Honorary Degree of Doctor of Laws of this great university in such distinguished company.¹ This particular honour I shall bear with pride and delight and gratitude, not caring at all for how little I personally deserve it or for the gentle astonishment of my judicial siblings and academic friends at home.

The invitation to deliver this paper referred to a survey, done by lawyers from Canada, the United States, and Britain, of the experience of the Anglo-American legal system over the past one hundred years. First, I must make some disclaimers. The United Kingdom is a unitary state, but it has three legal systems. I have worked in that of England and Wales. The law and legal systems of Scotland and of Northern Ireland are both separate and different. In particular, the grave problems created for the legal system in Northern Ireland by the concerted use of violence against the state and the resort to sectarian killing lie outside my experience and the scope of this paper.

Next, my work in the law was as a common lawyer at the bar. I was put in the Queen's Bench Division when appointed a judge in 1977. Since 1981, I have been Chairman of the Law Commission

1. On 28 October 1983, the Honorary Degree of Doctor of Laws of Dalhousie University was conferred on the Right Honourable Pierre Trudeau, Prime Minister of Canada; on the Honourable Mr. Justice Brian Dickson of the Supreme Court of Canada; on the Honourable Taslim Elias, President of the International Court of Justice; and on the Honourable Rachelle Glube, Chief Justice of the Trials Division of the Supreme Court of Nova Scotia.

for England and Wales. My part in this survey must be that of the practising, rather than of the comparative, lawyer.

The main purpose of our legal system, given substantive laws which are just, is to secure for every citizen access to justice which is sufficient, effective, and equal, and to secure for the state effective and just process against the individual in protection of the rights of the community. That purpose must be served by sets of legal rules and it is with those parts of our system that this paper is concerned. The rules by which the citizen can restrain abuse of power by the state and enforce the rights which the law gives to him, and the rules by which the state can proceed against those suspected of crime, were devised to serve our fundamental ideals. Rules, however, are to be tested continually, not by what they are intended to do, but by how well they serve their purpose.

My contribution to this examination of the Canadian-Anglo-American system of law is to report on some of the work that has been done in England and Wales to advance this main purpose of our legal system and on work not yet done which ought to be done. Some, if not all, of our problems have counterparts in the other common law systems.

I shall refer to four parts of our legal system in which some of the strengths and the weaknesses of our tradition are apparent. First is our law of civil procedure, which requires fundamental reappraisal. We need to do again what the Victorian Judicature Commissioners did in the years before the reforms of 1873 to 1883. Second is our law of criminal evidence and procedure: the slow and steady reform of old rules has encountered, and still faces, resistance to change which appears to confuse existing rules with basic principles. Third is our administrative law, the means by which the citizen should be protected from abuse of power by the state and public bodies. Here the judges failed for a time to perform their proper function, but have now found again in the common law its full capacity for development. Fourth is our constitutional law itself, the rule of law which is in good health, but which is by itself no longer sufficient for the task.

One hundred years ago in England, it was, and for some fifty years had been, a time of vigorous and effective law reform. The regulation of society and the advancement of social welfare by statute law was under way. The civil procedure of the superior courts and those courts themselves had been entirely reorganized by the Judicature Acts of 1873 to 1875. These acts imposed on a

number of different courts one structure of judicature, combining common law and equity, providing new rules of procedure designed to avoid the defeat of any just claim by technical error, and offering the latest improvements for pleadings copied from those that had recently been introduced in the United States.² The structure of criminal procedure, based on trial by lay magistrates for minor offences and on jury trial for serious offences, was already long established, with all the common law features of accusatory process, the right to silence, adversary trial, and exclusionary rules of evidence. The accused had been allowed counsel in all cases since 1837,³ but was prohibited from giving evidence on his own behalf in all cases until 1898.⁴ He had to wait until 1907 for the creation of an effective right of appeal against conviction for error of law or irregularity and against sentence.⁵

As for our constitution, it was then the cause of great satisfaction. In 1885, Professor Dicey published his classic exposition of the rule of law within our system, describing it as a unitary state of which the basic law is the uncontrolled⁶ sovereignty of Parliament. Dicey, who was contemplating a very different electorate and politics less polarized than today's, expressed no fear of either the despotism of an unfettered executive or the elective dictatorship which some in England, including Lord Hailsham,⁷ have seen as the threat presented by the combination of a sovereign parliament and by the workings of our elective system, which is based upon a simple majority in single-member constituencies. Professor Wade has described that elective system as probably the worst that could be devised,⁸ but two of our major political parties persist in admiring it.

In 1885, the first federal government within the British Commonwealth — that of Canada — was eighteen years old and was functioning under what was then the British North America Act, 1867. In the first volume of the *Law Quarterly Review* that year, Dicey commented upon federal limited government in terms

2. Sir Jack Jacob, Q.C., *The Reform of Civil Procedural Law* (Sweet & Maxwell: 1982) p. 315. Also see Professor Jolowicz, *General Ideas and the Reform of Civil Procedure* (October 1983) *Legal Studies*, Vol. 3, No. 3, pp. 227, 235.

3. 7 and 7 Wm. IV, c. 114.

4. Criminal Evidence Act, 1898.

5. Criminal Appeal Act, 1907.

6. *McCawley v. The King* (1920) A.C. 691, 704.

7. *The Dilemma of Democracy* (1978).

8. H.W.R. Wade, *Constitutional Fundamentals* (Stevens: 1980) p. 9.

which revealed no envy of those who enjoyed it. "Federal government means weak government," he said. "The distribution of powers among co-ordinate authorities necessarily leads to the result that no one authority can wield the same amount of power as, under a Unitarian constitution, is possessed by the Sovereign. The federation will be at a disadvantage in a contest with unitarian states of equal resources."⁹ He explained that the apparent security that the United States of America had enjoyed to that date under a federal constitution did not invalidate his conclusion, because the United States had no powerful neighbours and had no foreign policy whatsoever. He concluded with these words: "Whether the different parts of the United Kingdom could, under any circumstances, be formed into a federal state with a feeble central government, a rigid constitution, and a powerful judiciary is an enquiry not for lawyers but for statesmen." So it is today, and some are still enquiring into it. Lawyers, however, have been pointing out that the existing system is capable of improvement without turning the United Kingdom into such a federal state as Dicey described.

Under the rule of law as proclaimed by Dicey, the enforcement of the rights of the individual depended upon the right to sue in the ordinary courts, and to do that the ordinary citizen needed the services of a lawyer. Very few could afford it. In 1883 the need for legal aid in some cases was recognized, but in both civil and criminal courts what was provided by law was, in general, niggardly and ineffective¹⁰ and was largely based upon the charity of lawyers. It was to remain so for another seventy years. Trade unions filled a large part of the gap through their legal aid benefit, but there must have been much denial of justice outside their cover.

Since 1949, legal aid has been an established part of our legal system, as it is in many other countries. The principle behind it is that legal aid ought to be provided in any proceedings in which legal representation is necessary in order for access to justice to be equal and in which it is reasonable to grant it. Financial limits of eligibility exclude those who are judged able to pay, and those

9. 1 L.Q.R. 80, 95.

10. Rules of action in formal pauperis, enacted by statutes of 1485 and 1551 (11 Hen. VII, c. 12, and 23 Hen. VIII, c. 15), repealed and provision made in 1883 by Rules of Court for admission of the poor to sue as "poor persons" with the help of free and unpaid services from lawyers. In crime there was the "dock brief" and aid later under the Poor Prisoners Defence Act, 1903. See generally, E.J. Cohn, *Legal Aid for the Poor* (1943) 59 L.R.Q. 253, and *Reports of Committees* (1926; Cmnd. 2638) and (1928; Cmnd. 3016).

limits have themselves caused no little unfairness.¹¹ Since the scheme was set up in 1949,¹² it has been extended by successive governments, step by step, so that it now covers almost the whole of the legal system in the ordinary courts, but only a very small part of the system within the special and administrative tribunals, which deal with, among other things, claims to social security benefits. Our legal aid is based upon the provision to the assisted litigant of the services of lawyers essentially as if the lawyers were privately employed,¹³ and upon the rule that the litigant with legal aid who loses can only be required to pay such part of the winner's costs as is reasonable, having regard to the loser's means.

The provision of legal aid on this basis has made government not only concerned with, but greatly concerned by, the cost of providing it. As legal aid is provided in one part of the system, the injustice of denying it in another similar part becomes uncomfortably apparent. Yet, cost is inevitably a factor for those who decide to what further parts of the system legal aid can be extended, and in decisions about how any new or reformed legal scheme should be structured. For example, instead of providing legal representation before the Supplementary Benefits Tribunals, before which people in need claim rights given by welfare laws, can the substantive law and procedural rules be such, and the tribunals so constituted, that the absence of professional representation in any contest is acceptable? The Legal Aid Advisory Committee has thought that it is not acceptable¹⁴ and has recommended that legal aid be made available in those tribunals. A second example is proceedings for libel or slander. Only the High Court has jurisdiction over such issues, and in such cases there is no legal aid.¹⁵ Distinguished bodies¹⁶ keep

11. Applicant not eligible for legal aid if "disposable" income is in excess of £4,400 per annum or if "disposable" capital exceeds £2,725, unless costs of case likely to be very high. In computing disposable income, allowances are made for various obligations; for disposable capital, various assets are disregarded, including a main or only dwelling house. See *Legal Aid (Assessment of Resources) Regulations* (1980) S.I. 1980, No. 1630, H.M.S.O. *Legal Aid Handbook*, 1983.

12. *Legal Aid and Advice Act*, 1949.

13. For a discussion of the duty of lawyers acting under a legal aid certificate to have regard to position of their client's opponent, see *Kelly v. LTE* (1982) 1 W.L.R. 1055, C. of A.

14. See *The Law Society's Report on Legal Aid, 1972-1973*; Lord Scarman, *The New Dimension* (Stevens: 1974) p. 40.

15. *Legal Aid Act*, 1974, s. 7(1), and Sch. 1, Pt. II, para. 1.

16. *Faulks Committee on Defamation* (1975; Cmnd. 5909) para. 581; *Report of Royal Commission on Legal Services* (1979; Cmnd. 7648) para. 13.70.

saying that it should be made available and that the legal aid committee could ensure that only cases of real importance would be litigated at the public's expense. Government has not so far been moved,¹⁷ and who can be surprised? It is at least a tenable view that this is a form of relief in which the burden and risk in costs provides an indispensable check to the abuse of proceedings.¹⁸

II. *Civil Procedure*

Concern over the cost of providing legal aid has made us aware of the need for more detailed information as to how the legal system actually works and when and why cost is incurred. The intuitive judgment of lawyers, however distinguished, is no longer a sufficient basis for decisions on procedural reform. Such information will be indispensable for the reappraisal of the whole of our system of civil justice which is now required. The lessons learned from operating the legal aid scheme over a period of thirty-four years will be a good basis on which to start.

The reappraisal that is needed is one of the whole system of civil justice, not merely of the procedures of the ordinary lawyers' courts. That ordinary procedure itself has been improved and refined, but it is recognizably the same structure as that of 1883. The main change has been the almost complete abandonment of the civil jury.¹⁹ Few, if any, regret its passing.

Our ordinary court procedure is capable of working with great speed and efficiency, provided, that is, that no party is determined to prevent a decision being made quickly. Where there is a real dispute about facts, we see no effective substitute for the powerful machinery of adversarial trial. The abiding problem, of course, is the abuse of procedures: rules which were designed to enable a party to test evidence on disputed issues of fact are frequently used for the

17. Hansard, British H. of C. debate (7 Dec. 1981) Vol. 14, *Written Answers*, col. 281.

18. See J.R. Spencer, *Criminal Libel — The Law Commission Working Paper No. 84* (1983) C.L.R. 524 at 527, where it is also argued that extension of legal aid to defamation would constitute a threat to freedom of speech.

19. A right to a jury is afforded to a party charged with fraud, or to a party in an action of libel or slander, but there will be no jury even in such cases if the trial will require prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury: s. 6(1) of Administration of Justice (M.P.) Act, 1933. For discretion as to jury trial in other cases, see *Ward v. James* (1966) 1 Q.B. 273, and notes to R.S.C. Order 33, r.5, in *Annual Practice*, 1982.

purposes of delay and for intimidating an opponent by the threat of prohibitive costs of trial. Effective remedies against such abuse have, so far as I know, hitherto eluded all adversary systems.

We have had many committees of distinguished membership to examine different parts of our civil procedure, and many improvements have been made.²⁰ The users, however, are not content and the ancient complaints of delay and expense are made not only by disappointed litigants in the newspapers, but by successive Presidents of the Law Society.²¹ One example of a complaint comes from the Chartered Institute of Patent Agents. In 1982, they complained to the Lord Chancellor that the adversarial nature and the oral basis of patent litigation in our courts were such that only the most wealthy of patentees could justify enforcement of their rights, and that if the cost of patent litigation was not reduced, the whole concept of the patent system could fail. The complaint compared our procedures unfavourably with those of other countries, including Germany. The City of London Solicitors Company replied with assertions that large patent actions are unavoidably expensive, though no more expensive than other heavy litigation, and that changes in our basic procedure could not be made without reducing the standard of justice achieved. There was, in short, no apparent cure for this disease. The complaint is notable because it was made by professional users of legal services.

The Royal Commission on Legal Services reported in 1979 that it was time for a reappraisal of the operation of the system of justice in

20. Reports of Committees include: Gorrell Committee, *Report of the County Courts Committee*, 1909; the two *Reports of the Royal Commission on Delay in the King's Bench Division* (1913; Cmnd. 6761) and (1914; Cmnd. 7177); the three *Reports of the Business of the Courts Committee* (1933; Cmnd. 4265), (1933; Cmnd. 4471), (1936; Cmnd. 5066); *Report of the Royal Commission on the Despatch of Business at Common Law* (1936; Cmnd. 5065); the two *Reports of the Committee on County Court Procedure* (1948; Cmnd. 7468) and (1949; Cmnd. 7668); the four *Reports of the Committee on Supreme Court Practice and Procedure* (1949; Cmnd. 7764), (1951; Cmnd. 8176), (1952; Cmnd. 8617), and (1953; Cmnd. 8878); Winn Committee, *Report of the Committee on Personal Injuries Litigation* (1968; Cmnd. 3691); *Report of the Royal Commission on Assizes and Quarter Sessions* (1969; Cmnd. 4153); Oliver Committee, *Report on Procedure in the Chancery Division* (1981; Cmnd. 8205). See also the *Reports of Commercial Courts Users Conference*, and the *Annual Reports of Legal Aid Advisory Committee* and of the *Council of Tribunals*. See also Professor Jolowicz, *General Ideas and the Reform of Civil Procedure*, *supra*, note 2.

21. Sir Denis Marshall, 8 Oct. 1981 (1981) L.S. Gazette 1089; (1981) New L.J. 1061; Sir Max Williams, 13 Oct. 1982 (1982) L.S. Gazette 1269.

all civil cases.²² No such review has yet been commissioned by government and it is impossible not to feel sympathy for their hesitation.²³ Government must be uneasy regarding this large structure, which is beautifully made in parts but entirely lacking in overall design, and they must be wondering where best to begin and who should start the work. It is argued that we must begin again with fundamental principles and determine first what our civil procedure should be designed to do.²⁴ There is a growing demand for a right of individuals and of groups to invoke the jurisdiction of the courts for proceedings not only over private rights, but also in the public interest.²⁵ It is argued that the court structure, which is under examination for radical revision, must first be settled. And alongside the courts, but separate from them, are the special tribunals, of which there are now more than fifty.²⁶ They already decide more cases than do the courts,²⁷ and many of these are substantial cases of general public importance. Their procedures differ remarkably from those of the courts. In the Industrial Tribunals, where claims for compensation for unfair dismissal and claims under the Equal Pay, Sex Discrimination and Race Relations Acts²⁸ are decided, the strict rules of evidence are not applied.²⁹ There is no legal aid, but, instead of the general rule in our courts that the loser pays the reasonable costs of both sides, the loser in a tribunal can only be ordered to pay costs if the proceedings were

22. (Cmnd. 7648) para. 43.3.

23. In November 1983, after the paper was delivered, the British government announced that: "The Lord Chancellor intends to undertake a complete and systematic review of civil procedure. The first steps will be a thorough-going factual and statistical survey of the business management of work at all stages of civil litigation. The main purpose of the review will be to develop the present system and, if necessary, to restructure it, in order to achieve the most expeditious, economical and convenient disposal of business" (1983; Cmnd. 9077).

24. Professor Jolowicz, *supra*, note 2.

25. Professor Jolowicz, *Civil Proceedings in the Public Interest* (1982) Cambrian Law Journal 32, 46.

26. Some 54 tribunals are listed under 33 groups in the First Schedule of the Tribunals and Enquiries Act, 1971, which act consolidates the acts of 1958 and 1966. These tribunals are under the supervision of the Council of Tribunals.

27. *Royal Commission on Legal Services: Final Report* (1979; Cmnd. 7648) Vol. I, para 15.1.

28. For unfair dismissal, see part V, ss. 54 to 80, of the Employment Protection (Consolidation) Act. The other acts mentioned are the Equal Pay Act, 1970, the Sex Discrimination Act, 1975, and the Race Relations Act, 1976.

29. Philips, J., *The Times*, 24 Sept. 1977, and (1978) I.C.R. 10.

frivolous or vexatious.³⁰ There is no appeal on fact from the decision of such a tribunal, which consists of a lawyer chairman and two lay members, but there is an appeal on fact from the decision of a High Court Judge.

“Industrial Tribunals were set up with the purpose of operating cheaply, quickly and informally and, as far as possible, it is desirable that the formalities of the regular court should be avoided.” So said Mr. Justice Phillips in 1977, as President of the Employment Appeals Tribunal, which was then some six years old.³¹ He added: “To introduce a formal system of discovery and inspection and so on might, in the abstract, produce more perfect justice but it would be at such great cost in time, money and manpower that the whole machinery would grind to a halt.”³² It is odd that we construct a new system of judicature for important classes of claim and, in devising its procedure, take that of our regular courts as something to avoid. To the extent that both systems deal with similar cases, the procedure of one or the other must be suspect unless the differences are justified by the fact that the chairman of tribunals sits with two laymen. The inescapable conclusion is that, in general, government has not had such confidence in our ordinary procedure of trial by judge alone, through the adversary process and with the ordinary costs rule and with legal aid, as to employ it generally in new parts of the law, even where the disputes produced for resolution are similar in size and nature to other disputes now handled by the courts.³³ There has as yet been no general study of the efficiency, cost, and speed of tribunal proceedings compared with similar cases in the courts, nor any investigation of what the customers think of the differences. We need to carry out that study.

It is apparent that we can no longer regard any part of our system of civil justice with the assumption that the principles of orality, of

30. Rules of Procedure: Industrial Tribunals Regulations, (1974) S.I. 1974, No. 1386, rule 10. See also *Marler Ltd. v. Robertson* (1974) 1.C.R. 12.

31. *Stone v. Charrington Co. Ltd.* (1977) 1.C.R. 248.

32. Cited by D.B. Williams and D.J. Walker, *Industrial Tribunals: Practice and Procedure* (Butterworths: 1980) p. 34.

33. For example, claims to unfair dismissal in industrial tribunals are frequently similar in size and nature to claims for wrongful dismissal in breach of contract in the ordinary courts. Section 131 of the Employment Protection (Consolidation) Act, 1978 (formerly s. 109 of the Employment Protection Act, 1975), confers power on the Minister to confer jurisdiction on industrial tribunals in respect of damages, etc., for breach of contract. To date, the power has not been used.

the single continuous trial of all issues, and of the general availability of full adversarial process can continue unmodified. No doubt we must move by experiment and with caution. I think we must, however, begin with the belief that the courts should be trusted, much more than the rules now allow, to determine on what issues a party should be allowed full use of the adversary process with oral cross-examination of witnesses.

It is time for us to achieve, as the Victorians tried to achieve in 1883, a unified system of civil justice, providing for each part procedures most suited for the work to be done and taking the best forms available. Our lawyers will, no doubt, have to accustom themselves to the modification of some long-held assumptions.

III. *Criminal Evidence and Procedure*

As to procedure and evidence in criminal law, for many years questions have been asked within our system, as in all others, from the two poles of the argument. One side asks if the scales are not unfairly weighted against the prosecution and the other side asks whether vital principles are not endangered by reforms designed to reduce delay or to remove obstacles to the success of some prosecutions. Our system of criminal justice works tolerably well in most cases and for most of the time. There is general confidence in the jury as the best available method of trying serious crime: it deals, of course, with about two to three percent of all criminal business. It is known that a jury, properly directed in law on the evidence, is *capable* of being persuaded of the guilt of an accused who is not guilty of the offence charged, and there have been expressions of anxiety as to the sufficiency and effectiveness of our appeal procedures. A verdict is an opaque and unreasoned decision, even when entirely right. The Lord Chief Justice has announced that a less strict approach will be adopted toward the admission of fresh evidence on appeals.³⁴ The main stresses to which the system has been subjected have been from the result of increasing crime rates and from a loss of confidence in the fairness of some police officers in the investigation of crime, particularly in their dealing with blacks. The rules of criminal law cannot heal social divisions, but bad methods and manners in the prosecution process can make such divisions wider.

34. Lord Lane, Lord Chief Justice, reported in *The Times*, 5 September 1983.

The questions which I shall mention, relating to rules of procedure or evidence, are not of great importance in the sense of affecting the result of a large number of cases. Their importance lies in the fact that they are rules capable of being changed by legislation, and not manifestations of social problems. They affect the way in which the law and the way it works appear to the public in the vital point of contact, namely, the dealing between the court and the jury. Wherever the law, in its treatment of the jury, appears to be technical and lacking confidence in the good sense of the jury — whether in instructing them in terms which appear illogical, denying information to them which they reasonably wish to hear, upsetting their verdicts for reasons which, while right in law, seem unsubstantial, or asking them to perform feats of intellectual labour which we and they know are beyond their powers — there the law risks, even where for good reason it must continue to do so, the loss of part of the respect and confidence which it ought to command.

The essential principles of our criminal law are the same as a lawyer would have claimed them to be in 1885. They are the privilege against involuntary self-incrimination, the placing of the general onus of proof on the prosecution, and the over-riding requirement that a trial must be fair. The procedure and the rules of evidence should be such as are necessary to secure the acquittal of the innocent, to enable the truth to be established and the guilty to be convicted, and, lastly, to avoid delays and shorten trials. The rules by which those principles were served in 1885 were defective. They are better now, but, given those principles, much remains to be done.

Continuous work of adjustment has gone on as in all jurisdictions. Rules devised in one country for serving those essential principles take very different forms in some other country that is equally enlightened. In no other subject is the work of comparative lawyers and historians more valuable for the education of working lawyers. It seems that the fairness of trials in general depends far more upon the determination of courts and lawyers within a system to achieve fairness and upon the integrity of those engaged in the prosecution process than upon the terms of particular rules. The rules, however, must command the sufficient confidence of the community. If rules acquire symbolic value beyond their rational content, they have to remain until there is sufficient public confidence, particularly in the prosecution process, for changes to be made. We have had examples of this with reference to the jury,

both as to the rules which control its working and as to the evidence which the jury is permitted to hear and is trusted to weigh. The symbolic value of some rules has been maintained not only by public tradition, but also by the conservatism of lawyers who have loyalty to old rules of which the rational justification is no longer convincing.

As to the working of the jury, our law does not allow questioning of jurors before challenge,³⁵ and there is no support among lawyers for its introduction. The right of peremptory challenge permits an accused to exclude any person from the jury whose appearance suggests lack of sympathy or unwelcome views or capacities, and the accused may thus select for exclusion as many as the law allows. The old rules of peremptory challenge were generously fixed in 1825 at twenty-two for each defendant in felony.³⁶ Where juries are drawn from a homogeneous group, peremptory challenges are not used much; they are a waste of time.³⁷ Where the list contains people of very different backgrounds and attitude, whether of class, colour, or sectarian allegiance, then challenges are much used. Those old rules were changed in stages. Peremptory challenges were reduced to seven in 1949³⁸ and to three in 1977.³⁹ The jury still consists, as it is supposed to, of twelve people chosen at random from adults on the electoral roll whose ages are between 18 and 65. But through the changes, the amount of selection which the accused can achieve was rightly and sharply reduced.

We have also abandoned the long-revered unanimity rule and, since 1967, have accepted majority verdicts of ten and eleven out of twelve.⁴⁰ The Canadian Law Commission has recently recom-

35. A right of cross-examination of a potential juror arises only where a foundation of fact has been laid by an accused in support of a ground of challenge; see *R. v. Chandler* (1964) 48 C.A.R. 143, 151, and *R. v. Kray* (1969) 53 C.A.R. 412.

36. Juries Act, 1825, s. 29.

37. In 1950, Lord Denning, who was at the bar from 1923 to 1944 and a trial judge from 1944 to 1948, did not recollect a single "challenge" or "standby for the Crown"; see *Reg. v. Sheffield Crown Court, ex p. Brownlow* (1980) Q.B. 530; (1980) 2 A.E.R. 444; 71 C.A.R. 19.

38. Juries Act, 1949. The Canadian Criminal Code, s. 562, states that in murder or treason, twenty peremptory challenges are allowed; for offences punishable by five years' imprisonment or over, twelve are allowed; and in others, four.

39. Criminal Law Act, 1977, s. 43.

40. Criminal Justice Act, 1967, s. 13 (now Juries Act, 1974, s. 17); *Practice Direction* (1967) 1 W.L.R. 1198.

mended retention of the unanimity rule in crime,⁴¹ but in Scotland a simple majority of a jury of fifteen has apparently always been sufficient⁴² for purposes which, I am sure, are no more crude than ours.⁴³ By this change the awesome power of the prejudiced or irrational juror was reduced and some protection was provided against the bribing or threatening of a juror. The majority verdict gives to a joint decision of ten out of twelve the respect which such a decision deserves, and it has avoided the need in many cases for retrials. The change has been resisted and criticized,⁴⁴ but the jury, I believe, remains trusted by the public under the new rules.

Several parts of our criminal procedure and rules of evidence were settled as rules of law when the accused had no right to give evidence, and the rules persisted unchanged long after the accused was made competent in all cases in 1898. The act of that year illogically preserved the right of the accused to make a statement from the dock not on oath about the facts; and juries had to consider what on earth was meant by a direction that the statement was not evidence but that they should attach such weight to it as they thought fit.⁴⁵ Long criticized, it was at last abolished by the Criminal Justice Act, 1982, but even this change had been opposed by many, including the General Council of the Bar.⁴⁶

If a man cannot give sworn evidence to explain why, although innocent, he chose to give no answer or chose to give only a partial answer when questioned about an offence, then it is necessary to deny any evidential value at all to a failure or refusal to answer those questions. That necessity ceases when he is able to give evidence, and it has seemed strange to some of us to have to tell a jury, or for a

41. Law Reform Commission of Canada, *Working Paper No. 27* (1980) Report No. 16, 1982.

42. Renton and Brown, *Criminal Procedure According to the Law of Scotland* (4th ed., Green and Son Ltd.: 1972) paras. 10 to 40. Professor Walker, Q.C., ed., *Oxford Companion to Law* (1980) p. 687. Professor Walker is Regius Professor at the University of Glasgow.

43. Scottish criminal law differs in many important respects from that of England and Wales. Lord MacKay, Lord Advocate, has described it as a hybrid between the accusatorial common law model and the inquisitorial model of civil law; see his address to the Howard League, 1983.

44. *Justice Deserted* (National Council for Civil Liberties: 1979).

45. *R. v. Frost and Hale* (1964) C.A.R. 284; Archbold, *Criminal Pleading: Evidence and Practice* (41st ed., Sweet & Maxwell: 1982) paras. 4 to 400.

46. This opposition occurred for reasons which Professor Cross called sentimental; see *The Evidence Report* (1973) C.L.R. 329. Abolition had been one of the proposals of the 11th Report of the C.L.R.C., fn. 45.

magistrate to have to tell himself, that there is no evidential value in the fact that an alert and intelligent accused failed to mention in the course of fair questioning a vital fact known to him which, if true, would have explained circumstances otherwise suggesting guilt. It is not easy to like a rule which permits use to be made of the admission of the ashamed, the remorseful, or the stupid offender, but protects the shameless and self-confident in his silence.

Our Criminal Law Revision Committee thought in 1972 that this rule was insupportable in today's circumstances, when legal aid is available, when the understanding and training of law magistrates and the general level of education of juries are greatly improved, and when we have the far greater rights of appeal that were introduced in 1907 and extended in 1968.⁴⁷ The committee recommended substantial restriction of this "right to silence"⁴⁸ and argued that it should be permissible for the jury or for a magistrates' court to draw whatever inferences are reasonable from a failure of the accused, when interrogated, to mention a defence which he puts forward in his trial, or from a failure to give evidence. Of course, they also recommended changes in the requirements of the judges' rules about cautioning, under which, as soon as a police officer has evidence which affords reasonable grounds for suspecting that a person has committed an offence, the officer must tell the person that he is not obliged to say anything, but that what he does say may be given in evidence.⁴⁹ To many concerned with law reform, the reception extended to this report (which contained many other recommendations) was depressing. Professor Cross of Oxford, who was a member of the committee, described much of the criticism directed at the Eleventh Report as being characterized by ignorance, self-righteousness, and unreason.⁵⁰ Yet, opposition to the restriction of the right to silence was also based upon more formidable arguments to the effect that no change should be made until procedures to ensure the fairness and accurate recording of questioning are available.⁵¹ None of the proposals was implemented.

47. Criminal Appeal Act, 1907; Criminal Appeal Act, 1968, s. 2(i)(a): "that the verdict of the jury should be set aside on the grounds that, under all the circumstances of the case, it is unsafe or unsatisfactory".

48. (1972; Cmnd. 4991) para. 28.

49. *Supra*, note 45, paras. 14 to 45 et. seq.

50. 1973 C.L.R., p. 329.

51. Debates in House of Lords, 14 Feb. 1973, Vol. 338, cols. 1546-1678.

Six years after the report of the Criminal Law Revision Committee, the government appointed a Royal Commission to examine the rights and duties of suspect persons and the criminal procedure and evidence relating thereto.⁵² The commission made its report in 1981.⁵³ They found the two predominating philosophies of perceiving and evaluating the criminal process, those of the utilitarian and the libertarian, to be so diametrically opposed as to defy reconciliation.⁵⁴ Thus, they set out to formulate proposals which would strike the proper balance.⁵⁵ In the result, some members of the commission showed sympathy toward the position taken by the Criminal Law Revision Committee, but the majority concluded that this part of the existing law should not be altered.⁵⁶ It is unlikely that we shall, in the near future, see any proposals that it should be changed. When we have the results of the extended use of tape-recorded interrogations and of the implementation of the other proposals of this commission, including the establishing of a nation-wide prosecution service so as to reduce police control of the prosecution of cases, the confidence of the public in the fairness of questioning may be restored. It will then be time to assert again the principle that all evidence should be admissible which is relevant in that it tends to render probable the existence or nonexistence of any fact on which innocence or guilt depends, and that rules of exception, by which relevant evidence must be excluded, should be retained only when shown to be necessary, whether because the evidence is too unreliable or for valid and overriding reasons of policy.⁵⁷ In deciding whether evidence is too unreliable or too prejudicial to be safely admitted, it is also to be hoped that we will show greater confidence in the jury. While our lawyers profess to venerate the jury, they have had but limited faith in its capacity of judgment.⁵⁸ Many of our rules of evidence betray an unwillingness to trust a jury with all the relevant material, even when the issues for

52. The Chairman, Sir Cyril Phillips, and a majority of other members were not lawyers. Legal members included Lord Justice Eveleigh and W.A.B. Forbes, Q.C., a Law Commissioner.

53. (Jan. 1981; Cmnd. 8092).

54. (Jan. 1981; Cmnd. 8092) para. 1.29.

55. (Jan. 1981; Cmnd. 8092) para. 1.35.

56. (Jan. 1981; Cmnd. 8092) para. 4.53.

57. *C.L.R.C. Eleventh Report* (Cmnd. 4991) paras. 14 to 20.

58. Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (Stevens: 1983) p. 41.

decision are within the ordinary experience and understanding of jury members.⁵⁹

There are, however, limits to the capacity of the jury to decide issues of fact properly, even when all relevant evidence is before them. There is general confidence in the decisions of juries both among the public and the judiciary, but there is grave doubt with reference to one particular class of case, namely, fraud cases of great complication. There is not a large number of such prosecutions each year. There would be more if a tribunal were set up which was capable of understanding the evidence in the most complicated cases known to the police. With reference to very complicated commercial transactions, it is impossible to believe that the jury as a whole properly understands the evidence or the issues. It will often reach a just result because some jurors — perhaps very few indeed — will have formed a view and will persuade the rest. Reason, however, demands that decisions upon cases of very great complication be made with full comprehension of the evidence and of its meaning in the commercial context of the transaction.

Anxieties have been expressed about the effective and fair prosecution of commercial fraud in many jurisdictions.⁶⁰ An alternative form of trial for such cases which has commanded support is that of a judge with two assessors, who have a requirement of unanimity to convict, an obligation to produce a reasoned judgment, and a right of appeal on fact. Such a trial would be available at the request of the accused or if the judge finds the case unfit for jury trial by reason of excessive length or complication. The importance of the proposal is that, if put into practice, much time and expense would be saved. More importantly, however, it would be possible to prosecute clever people who now escape although they are guilty of lucrative frauds,

59. See, for example, the rule which excludes as inadmissible a confession, with reference to which the Crown cannot prove that it was not obtained by fear or prejudice or hope of advantage exercised by or held out by a person in authority, even though any inducement was wholly unlikely to produce an unreliable confession of the offence in question; see *Commissioners of Customs and Excise v. Harz & Power* (1967) 1 A.C. 760, 818, 821. Proposals to change this rule were included in the Police and Criminal Evidence Bill, 1983: evidence of a confession would be excluded if obtained in consequence of oppression or anything likely to render a confession unreliable.

60. Dr. Michael Levy, Commercial Frauds (Commonwealth Secretariat: Feb. 1983) Annex. LMM (83) 18.

and we would stop damaging the concept of the jury trial by asking such trials to do things which they cannot properly do.

In our system of law, the jury has, of course, important functions apart from its role as the decider of fact. These functions have been discussed recently by the Law Reform Commission of Canada.⁶¹ They include representation of the community as a whole in the decision which determines guilt, and the role of ultimate protector of the citizen against oppressive enforcement of law. The value of the jury in these respects, however, does not justify its retention in cases for which it is unsuitable because of the incapacity of the jury to retain understanding of a complicated evidence dealing with unfamiliar concepts over weeks of trial. The government has announced its intention to appoint a committee to examine this subject. We must wait and see what happens.

IV. *Administrative Law*

In 1883 we had no written constitution and no rights able to prevail against an act of our Sovereign Parliament. We still have neither. There have been voices of great authority over the years warning us that we need both.⁶²

If the rule of law as proclaimed by Dicey was to be effective for the protection of the rights of the individual against the state, then our sovereign parliament must at least leave the courts free to enforce the rule of law. In our system, protection was not sought by trying to enact legal controls on the sovereignty of Parliament; rather, it was sought in a sound tradition, both in and outside Parliament, according to which exclusion of judicial review can be justified only on the ground of grave emergency, and even then only so far as can be justified by necessity.⁶³ The process has been one of shaming Parliament out of having recourse to unacceptable legislative devices, by means of both the writings of lawyers⁶⁴ and the admonitions of committees of most distinguished membership, such as the Donoughmore Committee of 1932 and the Franks Committee of 1957.⁶⁵ The preservation of judicial review against

61. *Supra*, note 41.

62. Recent examples include: Lord Scarman, *English Law — The New Dimension* (Stevens: 1974); Lord Hailsham, *The Dilemma of Democracy* (1978); and H.W.R. Wade, Q.C., *Constitutional Fundamentals* (Stevens: 1980).

63. Lord McDermott, *Protection from Power* (Stevens: 1957) pp. 66-67.

64. For example, see Lord Hewart, *The New Despotism* (Ernest Benn: 1929).

65. (1932; Cmnd. 4060); (1937; Cmnd. 218).

exclusion by Parliament has been generally successful, but, when preserved, it protects only against procedural injustice and illegality; it cannot ensure the substantial justice of administrative decisions made by government. There has been no attempt to provide for the examination of administrative decisions on their merits by judicial process. Parliament decided that reconsideration on the merits of decisions reached by administration was for Parliament alone, with the help of the parliamentary commissioner or ombudsman under our act of 1967.⁶⁶ We were, of course, following the ancient institution of the ombudsman in Sweden, which had been adopted in New Zealand in 1962 and since then in most common law countries.⁶⁷ Our ombudsman acts only on complaints referred to him by members of the House of Commons. No fees are payable and there is no liability for costs if the complaint turns out to be unjustified. The ombudsman has powers to inquire, but he can then do nothing but report. In most cases, any injustice which is capable of remedy is put right. The system was extended in 1973 to cover the investigation of the National Health Service, excluding matters of clinical judgment,⁶⁸ and, in 1974, to cover the investigation of maladministration in local government.⁶⁹ The ombudsman's office is confident, respected, and, it seems, a permanent part of our system of government. The process is entirely inquisitorial. It creates no new rights capable of enforcement by any individual, but the work of the ombudsman has brought satisfaction to many people whose complaints have been investigated. The ability to invoke the power of the ombudsman is part of the whole system of government. The process is entirely inquisitorial. It creates no new rights capable of enforcement by any individual, but the work of the ombudsman has brought satisfaction to many people whose complaints have been investigated. The ability to invoke the power of the ombudsman is part of the whole system of access to justice.

Given that Parliament in general has left the courts free to enforce the rule of law, how have the judges performed? For much of the

66. Parliamentary Commissioner Act, 1967.

67. This institution had also been adopted in many civil law countries, including France, Italy, Austria, and Spain; see Foulks, *Administrative Law* (5th ed., Butterworths: 1982) pp. 418-419, citing (1974) 90 L.Q.R. 211.

68. National Health Services Reorganization Act, 1973, Part III, ss. 31-39 (now Part V of the National Health Service Act, 1977).

69. Local Government Act, 1974.

period since 1883, the judges did not perform as the system required. The common law principles which were available for the task were ignored. The cause of this time of passivity (much harsher words have been used to describe it)⁷⁰ seems to have been a loyal regard for the judges' duty to defer to the will of Parliament without an equal determination first to establish, by the application of principles of law, what it was that Parliament must be treated as having willed. This unconfident time had begun by 1900 and it was to last for about fifty years. To Lord Hailsham, our Lord Chancellor, it looked almost as if the common law had run out of steam.⁷¹

The return to the confident development of the common law principles began most recently in 1952, when Lord Goddard rediscovered error on the face of the record as a ground for quashing, by certiorari, a decision of a compensation tribunal on loss of employment by a displaced clerk of a hospital board.⁷² The state which the law had reached is indicated by the argument advanced by the then Attorney General: even if the tribunal had got the law wrong in calculating the compensation, he said, and even if the error was visible, still certiorari should only lie for want or excess of jurisdiction. Since Parliament had provided for no appeal to the courts on a point of law, the clerk would have to put up with the error. The court set aside the tribunal's decision, and the time of recovery had begun.

There have now been thirty years of steady creative achievement by the courts in administrative law. In 1964, led by Lord Reid, a Scottish Law Lord, in the great case of *Ridge v. Baldwin*,⁷³ the House of Lords reasserted the old principle that the rules of natural justice applied to all administrative bodies and not only to those which can be called judicial or quasi-judicial. A Chief Officer of Police, acquitted by a jury but severely criticized by the trial judge and dismissed in consequence, was held to be entitled to a hearing by the Watch Committee before they could lawfully dismiss him. That decision has had a long and distinguished progeny.

I can mention only a few of the further landmarks of this progress. In 1968, the Minister of Agriculture was told by the

70. One such description put it as follows: "A dreary catalogue of abdication and error". See H.W.R. Wade, *Administrative Law* (5th ed., Oxford: 1982) p. 18.

71. *Supra*, note 58 at p. 36.

72. *R. v. Northumberland Compensation Tribunal* (1952) 1 K.B. 338.

73. (1964) A.C. 40; H.W.R. Wade, *supra*, note 70, pp. 461-478.

House of Lords that his apparently unfettered discretion was conferred by Parliament only for the promotion of the policy and objects of the act conferring the discretion, and such objects must be determined by the court by construing the act as a whole.⁷⁴ Again in 1968, the claim of crown privilege (now more properly known as public interest immunity) to prevent examination of documents was brought under control when the House of Lords established the power of the court to examine the documents for which privilege was claimed and to decide for itself whether production should be ordered, on the balance between any public interest in withholding the document and the public interest in ensuring the fair administration of justice.⁷⁵

In 1969, the Foreign Compensation Commission rejected a claim because they thought that the law did not allow it.⁷⁶ The act contained the provision that the determination by the commission of any application made to them should not be called into question in any court of law. The Lords recognized their duty to attribute autonomy of decision to the tribunal within its designated area, but asserted the counterpart of that autonomy, namely, that the limits of the area must be accurately observed by the tribunal and, since the tribunal was wrong in its view of the law, their decision was a nullity as one made without jurisdiction.

Some of the recent decisions made by the courts have been received in some quarters with much alarm as invasions of that area in which the decisions of elected bodies or of a Minister responsible to Parliament should be unquestioned as matters of policy; a "blatant and arrogant assumption of power" is one such description.⁷⁷ In 1982, on the application of a London Borough, the court declared illegal, under existing statutes, the cheap fares policy for London Transport which was funded out of local taxes and put into effect by the majority party of a newly elected Greater London

74. *Padfield v. Minister of Agriculture* (1968) A.C. 997. See Lord Reid at p. 1,030.

75. *Conway v. Rimmer* (1968) A.C. 910; H.W.R. Wade, *supra*, note 70 at pp. 725-728; *Lonrho Ltd. v. Shell Petroleum C.A.* (1980) 2 W.L.R. 367; H.L. (1980) 1 W.L.R. 627.

76. *Anisminic Ltd. v. Foreign Compensation Tribunal* (1969) 2 A.C. 147. See also H.W.R. Wade, *supra*, note 70 at pp. 263-267 and pp. 603-606.

77. Professor Griffith, *Administrative Law and the Judges*, Pritt Memorial Lecture: 1978 (Haldane Society of Socialist Lawyers, London: 1978) p. 20.

Council in performance of their election policy.⁷⁸ In another case, the Secretary of State for Education intervened to require a local authority to implement central government's policy of comprehensive education, on the statutory ground that the Secretary was satisfied that the local authority was acting unreasonably in failing to do so. No one doubted the honesty of the Secretary of State's belief in the unreasonableness of the local authority's policy, but the court said that he had, on the facts, no valid ground for holding the belief having regard to the true meaning in the law of "unreasonableness".⁷⁹ There has been great clamour about such decisions. There is a well-developed scepticism about the reliability of judicial judgment when it appears to impinge on social policy, but there is no general rejection of the idea of judicial review of the legality of the actions of such public bodies.

The procedural rules for judicial review, which control access to that remedy, were also in need of urgent reform.⁸⁰ Following the leads given in other common law countries, including the United States,⁸¹ New Zealand,⁸² and Canada,⁸³ new rules of court gave us, in 1977, the single application for judicial review,⁸⁴ namely, a flexible comprehensive code for the supervisory jurisdiction of the High Court. Most importantly, this new procedure preserved the old requirement that leave to start such proceedings needed to be given by the courts; for ordinary actions, of course, no leave is required. The claimant for judicial review will get leave only if he puts an arguable case before the court promptly and on affidavit.⁸⁵ The

78. *Bromley LBC v. Greater London Council* (1982) 2 W.L.R. 62, Court of Appeal and House of Lords.

79. *Secretary of State for Education v. Thameside M.B.C.* (1977) A.C. 1014.

80. Lord Denning described the procedure of the prerogative order in 1949 as being as useful for winning freedom as a pick and shovel for winning coal; see *Freedom under the Law* (Stevens: 1949) p. 126.

81. "Petition for Review" procedure, Federal Trade Commission Act, 38 Stat. 720, 1914, 15 USCA, s. 45(c), cited in Law Commission, *Working Paper No. 40*, para. 75.

82. New Zealand Judicature Amendment Act, 1972.

83. Judicial Review Procedure Act, 1971.

84. Rules of the Supreme Court Order 53, S.I. 1977, No. 1955. Before this reform, the remedies employed in administrative law belonged to "two families" — that of ordinary private law remedies, such as damages, injunction, and declaration, and the public law remedies of certiorari, etc. Prerogative remedies could not be claimed in an ordinary action. By the new procedure of judicial review, remedies in both families can be claimed. See H.W.R. Wade, *supra*, note 70 at p. 16.

85. Rules of the Supreme Court Order 53, r. 3 and 4.

purpose of the rule is to protect public authorities from the disturbance and uncertainty which would be caused if misconceived applications could be left pending.⁸⁶ The effect of the rule, when considered against ordinary proceedings, is striking: at the outset of the case the court is given the evidence on which the applicant relies, and the judges are required to decide, on the basis of that information, upon what issues, if any, the applicant will be permitted to require an answer from the respondent and to use against him the adversarial procedures of discovery and of cross-examination of witnesses. The rule is meant to preserve proper access to justice, while effectively limiting the abuse of legal proceedings.

But the law, as it was, allowed the claimant a choice: he could go by writ for an injunction or declaration without leave. In November 1982, the House of Lords completed the procedural reform on this point whereon the new rules were silent⁸⁷ by holding that, as a general rule, to which the necessary exceptions would have to be worked out case by case, it would be contrary to public policy and an abuse of the process of the court to permit a person to proceed by way of an ordinary action when he is seeking to establish that the decision of a public authority has infringed rights to which he was entitled by public law.⁸⁸ Appreciation of the distinction between public and private law has been a latecomer to our legal system.⁸⁹ It is bound to pose a large number of subtle and difficult questions for us,⁹⁰ and we do not yet know how well it will work in controlling abuse, but preserving the necessary access to justice.

V. *The Law of the Constitution*

Our system has thus, in its latest years, regenerated its powers. We have got the basis for a system of administrative law and we

86. *R. v. Inland Revenue Commissioners, ex p. National Federation of Self Employed and Small Businesses Ltd.* (1982) Q.B. 407; 1982 A.C. 617: per Lord Diplock at p. 643 at A.

87. The new s. 31 of the Supreme Court Act, 1981, was also silent on this point.

88. *O'Reilly v. Mackman C.A.* (1982) 3 W.L.R. 604, and H.L. (1982) 3 W.L.R. 1096.

89. *O'Reilly v. Mackman* per Lord Diplock (1982) 3 W.L.R. 1096, at p. 1102E.

90. See *Cox v. Thanet D.C.* (1982) 3 W.L.R. 1121. See also C. Harlow, *Public and Private Law: Definition without Distinction: The Doctrine of Exclusivity* (1980) 43 M.L.R. 241; and Jeremy McBride, *Civil Justice Quarterly*, Vol. 2, p. 268.

have an effective procedure, supported by a legal aid scheme. But until 1966, there was no form of legal process by which the actions of the executive could be questioned if those actions were justified by the domestic law passed by Parliament.

The United Kingdom had ratified in 1951,⁹¹ as a member of the Council of Europe, the European Convention on Human Rights. The main provisions, including the rights of life, liberty, due process in criminal proceedings, and freedom of expression and association, are familiar to everyone. The First Protocol declares that every person is entitled to the peaceful enjoyment of his possessions, subject to exceptions of wide generality in favour of state control in the public interest. The United Kingdom ratified this addition in 1952. A Fourth Protocol, which provided for rights of free movement out of and into the territory of the state of which any person is a national, was also signed in 1952, but the United Kingdom has never ratified it because of possible inconsistency with its immigration rules.

Ratification of the Convention and acceptance of the jurisdiction of the court would expose the United Kingdom to the risk of being judged by the European Court of Human Rights in Strasbourg to have contravened the provisions of the Convention. No one thought that there was any risk of that.⁹² The government could also have provided for incorporation of the Convention into the domestic law of the United Kingdom, but it did not do so. Incorporation would have required provision for resolving conflicts between the Convention and existing and future legislation, and established rules of common law, and such conflicts were not expected.

The United Kingdom having thus assumed by treaty an obligation to comply with the European Convention, but having made no alteration to its domestic law in consequence, acceded in January 1973 to the European Communities.⁹³ As a result, all applicable Community law, which does not include the Convention, has legal effect within the United Kingdom without any further procedure to incorporate it.⁹⁴ In the event of any conflict between our domestic law and Community law, it is Community law which prevails. When the legislation was introduced into Parliament, it was said that nothing in the act would abridge the ultimate sovereignty of

91. (1953; Cmnd. 8969).

92. Lord Elwyn Jones, L.C., *Debates in House of Lords*, 3 Feb. 1977, Vol. 379.

93. *European Communities Act*, 1972.

94. *European Communities Act*, 1972, s. 2.

Parliament,⁹⁵ and that is true, because Parliament could repeal the acts for our law, even if the United Kingdom were thereby put in breach of its international obligations. Community law is concerned mainly with economic matters and when applicable may afford a right to the individual which is superior to the right provided by domestic law.⁹⁶ But it has no general provisions in the nature of a Bill of Rights.

In 1978, the statesmen tried, by means of the Scotland Act and the Wales Act passed in that year, not to form a federal state in the United Kingdom, but to devolve legislative powers over defined subjects upon separate assemblies in Scotland and Wales while retaining the Scottish and Welsh members in the Parliament of the United Kingdom. In England, with 85 percent of the population and more than 85 percent of the economic power, there was to be no separate assembly.⁹⁷ The scheme contained no Bill of Rights nor any entrenched limitation upon the power of Parliament itself.⁹⁸ On 1 March 1979, this form of devolution failed on referendum to pass the test of sufficient acceptance, receiving only faint praise in Scotland and blunt rejection in Wales.⁹⁹

And so the domestic law of the constitution is, in substance, as it was in 1885. If the Convention was not to be part of our domestic

95. Sir Geoffrey Rippon, 831 H. of C. Debates 278, 15 Feb. 1972, cited by D.M. Clark and D.E. Suffrin in "Constitutional Conundrum", p. 32, in Furmston, M.P., Kerridge, R., and Suffrin, B.E., eds., *The Effect on English Domestic Law of Membership of the E.E.C. and of Ratification of the European Convention of Human Rights* (Martinus Nijhoff Publishers: 1983). I am indebted to all the essays in this book for much of this part of this paper.

96. *Garden Cottage Foods Ltd. v. Milk Marketing Board* (1982) C. of A., 3 W.L.R. 514; petition for leave to appeal allowed: (1982) 3 W.L.R. 523C. See also articles 85 and 86 of the E.E.C. Treaty.

97. Provision was made for determination of legislative competence of Scottish Acts in the Privy Council and for judicial review of acts of the Welsh Assembly in the courts of England and Wales; see Scotland Act, 1978, s. 19, and Wales Act, 1978, s. 70.

98. The scheme took notice of the obligations of the United Kingdom under European Community Law and international law, including the European Convention of Human Rights, and empowered the Secretary of State for Scotland and for Wales to intervene with reference to acts of either assembly which touched such obligations; see Scotland Act, 1978, s. 19, and Wales Act, 1978, s. 34.

99. The voting was as follows (percentages refer to numbers entitled to vote): Scotland, yes: 1,230,937, or 32.85 percent, and no: 1,153,502, or 30.78 percent; Wales, yes: 243,048, or 11.9 percent, and no: 956,330, or 46.9 percent. Because the requirement was 40 percent in favour (see Scotland Act, 1978, s. 85, and Wales Act, 1978, s. 80), the acts were repealed. See the Rt. Hon. Lord Murray, *Devolution in the U.K.: A Scottish Perspective* (1980) 96 L.Q.R. 35.

law — and it still is not — the government could, if it chose, grant the right of individual petition to Strasbourg under Article XXV on complaint of breach of the Convention by the United Kingdom. This right was not granted until 1966, in an action taken by a Labour Administration with Lord Gardiner as Lord Chancellor. At the same time, the government accepted the jurisdiction of the European Court of Human Rights. The right of individual petition has since then been renewed for short periods of years by successive governments. The right is, thus, truly precarious and depends upon renewal by executive action.

Things did not turn out precisely as expected. The United Kingdom has been adjudged to be in breach of its obligations under the European Convention in a number of cases which I can only call large. Government has, no doubt, found these events both surprising and embarrassing. Breach was established in a case about the working of the closed shop in our nationalized railways for which damages totalling £75,000 and costs of £65,000 were awarded to three claimants.¹⁰⁰ There have been cases, many of which were settled in the commission, about immigration. Breaches have also been established on individual petitions in other contexts, such as the use of corporal punishment in a school without the consent of parents,¹⁰¹ the censorship of mail by prison authorities and the refusal of permission for a prisoner to seek legal advice,¹⁰² and the working of the common law of contempt against *The Sunday Times* newspaper in its investigation and reporting of the Thalidomide case.¹⁰³ In one case, *Eire v. U.K.*, the proceedings were between two parties to the Convention. It was alleged that the authorities in Northern Ireland had inflicted torture on Republican prisoners by using a number of interrogative devices, such as wallstanding, subjection to noise, and deprivation of sleep. The court held that the techniques did not amount to torture, but were inhumane and degrading treatment in breach of Article III.¹⁰⁴

100. *Young, James and Webster v. U.K.*, Publications of the Court of Human Rights, Series A, Volume 44 (1981) 1 I.R.L.R. 408.

101. *Campbell and Cosans v. U.K.*, Council of Europe, Human Rights News, Press Release C. 81/43 and C. 82/57.

102. *Silver and Others v. U.K.*, 5947/82.

103. Application No. 6538/74, adopted 18 May 1977 (1979) 2 E.H.R.R. 245.

104. 5310/71 and 5451: Year Book 21, p. 602, cited by Gillian Douglas and Stephen Jones, in Furmston, Kerridge, and Suffrin, *supra*, note 95 at p. 532.

The response of the government to these and other decisions has been to discontinue the offending practices, often before decision by the court, and, when necessary, to change the relevant law, such as prison rules. There has been no sign of an intention to defy the decisions of the court, although not everyone agrees with the interpretation of the Convention by the various majorities in the Court of Strasbourg. The United Kingdom could denounce the Convention on six months' notice under Article LXV if it found the interpretation of the Convention by the decisions of the majority of the court to be wholly unacceptable. It has not done so and such a step is exceedingly improbable. In 1981, chastened but not dismayed, the government renewed the right of individual petition for five years.

There has long been discussion at home of the need for enactment of a Bill of Rights, much of it inspired by the first Canadian Bill of Rights of 1960.¹⁰⁵ An attempt was made in 1978 to incorporate the European Convention into our domestic law by ordinary statute. It failed. All of the arguments on both sides, with which Canadians are now so familiar, were advanced and refuted. Those then in favour of incorporation, including Lord Hailsham and Lord Scarman, recognized that the benefits to be gained by such a step were modest: it is impossible for us to entrench a Bill of Rights against being repealed or overridden without a new constitutional resettlement which is widely favoured but seen to be far out of reach. The modest gains promised are, however, valuable in the view of lawyers. The justified claimant would get relief much more quickly. Our courts would use the case law developed by the court at Strasbourg and would usefully add to its development. Our courts would be given the opportunity to mould the general concepts contained in the Convention into more particular terms suited to our society and law. There would be fewer cases against the United Kingdom in the court at Strasbourg. Those gains, if they are to be had, must wait until they seem so attractive to Parliament that they prevail over the arguments of other distinguished senior judges, including Lords Diplock, Morris, and Elwyn-Jones. Those against incorporation feared grave uncertainty in our law from the risk of challenge to any rule or public action. Some disliked asking judges

105. See *Legislation on Human Rights* (Home Office Discussion Document: June 1976), and Minutes of Evidence taken before Select Committee on a Bill of Rights, Nov. 1977, House of Lords, Sessions 1976-77 and 1977-78 (81).

to make what might be decisions of a political nature. Some were apprehensive of a flood of litigation. So much work for lawyers would cause us to have as many of the breed as now bless the United States, and in the matter of lawyers, the argument assumes that fewer is better.¹⁰⁶

The present arrangements are, thus, likely to continue for some time. It must be acknowledged that they are odd. We allow anyone to proceed against the United Kingdom and we accept the decisions on his complaint of a court of foreign jurists — now twenty-one judges in the Plenary Court — leavened, if that be the word, by one British member. We do not allow our own judges to pass judgment upon the complaint of breach of the Convention before it goes to Strasbourg. Odd or not, the effect so far has been satisfactory: scrutiny of rules and practices against the rights stated in the Convention has resulted in some clear gains for human rights, with no damage to anything but pride. Government has been made more vigilant to see that such rights are not impaired through inadvertence. We have brought into our legal system, at one remove, a Bill of Rights with recourse through the commission and, if it agrees, to an increasingly confident court at Strasbourg. No government is likely to incur the grave embarrassment of trying to expel it entirely. This innovation of international supervision over the compliance by a sovereign state with its promises about human rights has been shown to be effective. Some say that the Convention is itself in need of expansion and repair, but, such as it is, it has been made to work.¹⁰⁷ We can be modestly pleased about that, as we can be modestly proud of the fact that the general response of the United Kingdom to adverse decisions of the European Court has not been that of outraged pride, but of acceptance of the court's judgments. While as lawyers we are respectful and envious of the achievement of the Canadian Constitution Act, 1982, with the Charter of Rights and Freedoms therein, we do not expect soon to see in the United Kingdom enactment of a Bill of Rights in any way protected against repeal or subsequent impairment. In May 1983, Lord Hailsham, whose experience both as lawyer and politician

106. Lord Lloyd of Hampstead, P.D. Lords, Vol. 379, 3 Feb. 1977, col. 990, and Vol. 396, 29 Nov. 1978, col. 1325.

107. Cedric Thornberry, Governor of British Institute of Human Rights, *Memorandum of Evidence*, Select Committee, House of Lords, Minutes of Evidence, Nov. 1977, p. 224 at 226.

gives great authority to his words, said that if the British people ever come to accept limited government by some form of devolution or by incorporation of a Bill of Rights, it would be piecemeal and then only as a result of crisis.¹⁰⁸ It is, however, reasonable to hope that, before very long, when we have worked out procedures for, and acceptable limitations upon, judicial review for these purposes, Parliament may be persuaded to take the provisions of the European Convention, with which our government has already promised other states that it will comply, and by ordinary repealable statute make it part of our own law. We shall hope that arguments to persuade our Parliament to such a course will be found from the experience and achievements of the courts of Canada under the terms of your Charter.

108. *Hamlyn Revisited* (Stevens: 1983) p. 29.